

Pan (Migration) [2021] AATA 2318 (22 June 2021)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mr Wei Pan
VISA APPLICANTS:	Ms Kwan Lee Chan Ms Yuet Yin Leung
CASE NUMBER:	1914506
DIBP REFERENCE(S):	BCC2017/3753811
MEMBER:	P. Maishman
DATE:	22 June 2021
PLACE OF DECISION:	Perth
DECISION:	The Tribunal remits the applications for Partner (Provisional) (Class UF) visas for reconsideration, with the direction that the first named visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa: • cl.309.211(2) of Schedule 2 to the Regulations, • cl.309.221 of Schedule 2 to the Regulations. • In relation to the secondary applicant, the Tribunal remits the application for the visa to the Minister to consider the remaining criteria for the grant of the visa.

Statement made on 22 June 2021 at 3:44pm

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) visa – Subclass 309 (Partner (Provisional)) – spouse or de facto partner – validly married – onshore visa application refused and applicant departed Australia – lived with ex-husband in home country because of shortage of accommodation – delay in applying for offshore visa – limited joint finances and household while applicant in home country – travel between Hong Kong and mainland China restricted by COVID-19 – social aspects of relationship – nature of commitment – consistent and credible evidence – decision under review remitted

LEGISLATION

Migration Act 1958 (Cth), ss 5F(2), 65

Migration Regulations 1994 (Cth), r 1.15A(3), Schedule 2, cls 309.211(2), 309.221

CASES

Bretag v MILGEA [1991] FCA 582

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 1 April 2019 to refuse to grant the visa applicants Partner (Provisional) (Class UF) visas under s.65 of the *Migration Act 1958* (the Act).
2. The first named visa applicant (the applicant) applied for the visa on 13 October 2017 on the basis of their relationship with their sponsor, the review applicant (the sponsor). At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211(2) because the delegate was not satisfied the visa applicant is the spouse, as defined, of the sponsor.
4. The Tribunal exercised its discretion to hold the hearing by videoconference. The hearing was held during the COVID-19 pandemic. The Tribunal determined it was reasonable to hold a hearing by videoconference, having regard to the location of the applicants, nature of this matter and the individual circumstances of the applicant.
5. The first named visa applicant sought to postpone the hearing to another day because she was working. The Tribunal considered the applicant's request and noted the parties had been on notice of the hearing date for some six weeks prior to making the request to postpone the hearing. The Tribunal considers the visa applicant had ample opportunity to make alternative work arrangements and declined the request to postpone the hearing.
6. The Tribunal also had regard to the Tribunal's objective of providing a mechanism of review that is fair, just, economical and quick, and the delay to the matter if the hearing was not to be conducted by videoconference.
7. The Tribunal is satisfied that the applicant was given a fair opportunity to give evidence and present arguments.
8. The review applicant appeared before the Tribunal on 1 June 2021 to give evidence and present arguments. The Tribunal also received oral evidence from Ms Kwan Lee Chan and Ms Yuet Yin Leung, the visa applicants.
9. The Tribunal was assisted during the hearing by an interpreter of the Mandarin and English languages.
10. The review applicant was represented in relation to the review by his registered migration agent.
11. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

12. The Tribunal had before it a copy of the departments file containing the visa application, the sponsorship form and evidence provided by the applicant to the Department.
13. The sponsor gave the Tribunal a copy of the delegate's decision record with his application for review. The delegate's decision record summarises the visa application history. The applicant is 43 years old and the sponsor is 28 years old. The sponsor's daughter from a previous relationship is included in the application. The delegate accepts the parties were validly married on 1 June 2015. The applicant first applied for an onshore Partner visa on 25 November 2015. That application was refused on 10 February 2016 because the applicant did not meet the Schedule 3 criteria and the applicant departed Australia on 6 March 2016.
14. The delegate was concerned the parties wedding ceremony was perfunctory, hastily arranged and not attended by sponsors family or friends. The delegate was concerned the applicant did not make this application until October 2017, some 19 months after departing Australia. The delegate was concerned the applicant and sponsor lived apart for three years from the time the applicant left Australia in March 2016 and lived with her ex-husband during that time. The delegate was concerned the applicant did not explain why the parties lived in rented accommodation between November 2015 and January 2016 rather than at the home owned by the sponsor. The delegate was not satisfied the applicant was a credible witness because of contradictory information about her work experience on her student visa applications.
15. The Tribunal received a significant amount of additional information and submissions on 26, 28 and 31 May 2021. This information has been forwarded to the Department.
16. The applicant and sponsor gave evidence separately at the hearing.
17. The sponsor denied his wedding was perfunctory or hastily arranged. He met the applicant in early 2015 and she became his girlfriend soon after and moved into his house that he shared with his mother, stepfather and some of his mother's employees around April 2015. The sponsor described a fractious relationship with his mother and she and his auntie spoke badly of the applicant and her age. The sponsor was aware the applicant held a ticket to leave Australia and he was afraid he would not see her again so proposed marriage. The applicant and sponsor married on 1 June 2015 and did not tell his mother or other family of their marriage because of their attitude towards the applicant. The sponsor and the applicant were not comfortable living in his house with his mother and stepfather and obtained a lease for alternative premises at Rivervale between November 2015 and January 2016 at which time the landlord sold the property.
18. The applicant gave consistent evidence about the development of their relationship, their wedding arrangements and confirmed she rescheduled her ticket to depart Australia to March 2016 to spend time with the sponsor after their marriage. The applicant says she commenced the application process for an Australian visa in March 2016 and provided invoices confirming the engagement of a migration agent to work on her subclass 309 visa application dated 29 March 2016 and 1 July 2017. The applicant arrived back in Hong Kong with no arranged employment or accommodation. The applicant resumed staying in the premises occupied by her ex-husband and daughter on her return to Hong Kong as the waiting list to obtain accommodation is about two years and she expected her visa application to take about 12 months to process. The applicant said she had contributed a significant amount of money towards the renovation of the premises in which her ex-husband and daughter reside in Hong Kong. Her ex-husband contributed nothing to the renovation and refused to reimburse her costs despite remaining in the premises when they

separated. The premises provide secure accommodation for her daughter and the applicant considered she was entitled to stay at the premises given her financial contribution.

19. The Tribunal questioned the parties about their relationship history, development of their current relationship, knowledge of each other's backgrounds and family relationships, the financial, social and household aspects of their relationship and the nature of their commitment to each other. Their responses were generally consistent, differing enough to indicate they were providing authentic responses from their own perspectives and knowledge. The parties gave suitable and consistent oral evidence addressing the delegate's concerns. The Tribunal found the applicant and sponsor to be credible witnesses and accepts their oral evidence on that basis.
20. The issue in the present case is whether the applicant is the spouse of the sponsor.

Whether the parties are in a spouse or de facto relationship

21. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australian permanent resident.
22. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP*[2017] FCAFC 206.

Are the parties validly married?

23. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The Departments file contains a copy of a marriage certificate registered at the Registry of Births, Deaths and Marriages, Perth certifying the applicant and sponsor are married. There is nothing before the Tribunal that suggests the marriage is not valid.
24. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spouse relationship met?

Financial aspects

25. The parties do not claim to have joint ownership of assets, liabilities or legal obligations owed to each other. The sponsor purchased his property prior to meeting the applicant. The sponsor's mother gave him the deposit for the purchase of his South Lake property and provided supporting documentation from her business so he could obtain a mortgage. The sponsor's mother purchased his car for him.

26. The applicant and sponsor held joint ANZ accounts (*64738 and *64711) from May 2015. Statements provided for these accounts for the period from the parties' marriage in June 2015 to the applicant's departure from Australia in March 2016 show purchases at furniture shops coinciding with their move to Rivervale in November 2015. There are few transactions during that period otherwise indicating the account is used for the sharing of day-to-day expenses.
27. The Tribunal received a number of screen shots of WeChat financial transfers along with a summary prepared by the representative. The summary suggests the applicant and sponsor regularly transferred sums between each other from 2018 to date.
28. Receipts of international money transfers show the applicant and sponsor intermittently remitted significant amounts to each other from 2015 to 2020. The parties deny the amounts are paid or received in order to contrive a financial relationship or in order to secure the visa. The parties explained the amounts were paid from the sponsor mostly for the favour of the second-named for her education expenses. Payments from the applicant to the sponsor were paid to assist him to pay his mortgage and to help with building a house they purchased together in mainland China.
29. The Tribunal gives the financial aspects of the visa applicants and review applicant's relationship some weight in favour of the existence of a marriage relationship. The parties reside in different countries and have not had the benefit of pooling their resources in any meaningful way. The sponsor has provided some funds to support the second-named applicants studies.

Nature of the Household

30. The second named applicant confirmed the outline of evidence received by the Tribunal was prepared by her and was truthful. She told the Tribunal she did not have strong relationship with her natural father, but that the sponsor was good to her and her mother. She is happy her mother is married to the sponsor and thinks they are a sweet couple. She observed that they talk to each other frequently on WeChat. When the sponsor visited Hong Kong he would usually stay in a hotel with her and her mother and she travelled to mainland China with them. The sponsor was good with electronics and helped her with her computer issues. The sponsor continued to support her in her studies.
31. The applicant explained to the Tribunal the circumstances of their current living arrangements with her ex-husband which was of concern to the delegate. The Tribunal accepts the arrangement was intended to be relatively short-term and alternative accommodation in Hong Kong is difficult to obtain. She travelled to mainland China with the sponsor and prepared a property for them to move in to. The applicant returned to Hong Kong because she could earn better salary than in mainland China. The occurrence of the Covid-19 pandemic curtailed her ability to travel freely between Hong Kong and mainland China to spend time with the sponsor. The sponsor is not permitted to work in Hong Kong and can only enter and stay in Hong Kong for 7 days. He is required to quarantine for 14 days so it is impractical for him to travel to, or stay in, Hong Kong.
32. The parties have been geographically separated for much of their relationship and have not established a pattern of sharing of household tasks. The Tribunal accepts their evidence they share a bedroom when they are together. The sponsor provides emotional and financial support in respect of the second-named applicant.
33. The Tribunal is satisfied the nature of the applicant and sponsors household, when they are not geographically separated, is indicative of a couple in a spouse relationship.

Social aspects of the relationship

34. The Tribunal received statements from the applicant's sister and nephew confirming they have met the sponsor and know him to be the applicant's spouse. The second-named applicant confirmed her mother's relationship with the sponsor and the travel they had undertaken as a family. Each of the applicant's relatives detail time spent with the applicant and sponsor and their observations of the parties as a couple.
35. The Tribunal received statements from the sponsor's father, aunt and cousin confirming they had been told of the sponsor's marriage to the applicant and know them to be spouses. The sponsor's friend Daniel Wood provided a statutory declaration declaring he knows the applicant and sponsor and considers their relationship genuine and continuing. Each of the witnesses details they have met the couple and have participated in various social events together. The sponsor's aunt detailed the applicant was included in the sponsor's family tree during a homage at the sponsor's ancestral hall.
36. The Tribunal received photographs of the applicant visiting the sponsor's ancestral hall and entry of her name in the family tree.
37. Travel records and accommodation receipts support that the parties have travelled together and stay together.
38. The Tribunal is satisfied the evidence provided is consistent and demonstrates the applicant and sponsor represent themselves to other people as spouses, are recognised by their families, friends and acquaintances to be married to each other and plan and undertake joint social activities together.
39. The social aspects of the applicant and sponsor's relationship is indicative of a couple in a spouse relationship.

Nature of the parties' commitment to each other.

40. The applicant and sponsor have been married for more than six years. The applicants initial (onshore) Partner visa application was refused and the applicant departed Australia as required. The Tribunal accepts the applicant's explanation about the apparent delay of applying for this visa and does not consider it reflects adversely on the veracity of the applicant's or sponsor's claims about their relationship.
41. The parties acknowledged the sponsor's age and the difficulties she may have in relation to having children as time went on. They had planned to have a child in 2020, but the Covid-19 pandemic prevented that from happening. They hope to be able to reunite in the near future so the applicant has the best chance of falling pregnant. The parties maintain the communication electronically and have done for the duration of their relationship while apart.
42. The Tribunal is satisfied the applicant and sponsor have been in a long-term relationship since they were married. They see their relationship as continuing and long term. They maintain companionship and emotional support for each other by regular electronic communication.
43. The nature of the applicant's and sponsor's relationship with each other is indicative of a couple in a spouse relationship.
44. Having considered the circumstances of the relationship as set out in r.1.15A(3), the Tribunal is satisfied that at the time of application, the parties had a mutual commitment to a shared

life to the exclusion of all others, they were in a genuine and continuing relationship, and they do not live separately and apart on a permanent basis.

45. The Tribunal has had regard to later events in relation to the earlier point in time as canvassed, as the later events tend logically to show the existence of facts that existed at the time of application: *Bretag v MILGEA* [1991] FCA 582.
46. Therefore at the time of application and at the time of this decision the parties meet the requirements for a spousal relationship within the meaning of s.5F(2)(b)-(d).
47. On the basis of the above the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and at the time of decision.
48. Therefore the visa applicant meets cl.309.211(2) and cl.309.221.
49. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.

DECISION

50. The Tribunal remits the applications for Partner (Provisional) (Class UF) visas for reconsideration, with the direction that the first named visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
 - cl.309.211(2) of Schedule 2 to the Regulations,
 - cl.309.221 of Schedule 2 to the Regulations.
 - In relation to the secondary applicant, the Tribunal remits the application for the visa to the Minister to consider the remaining criteria for the grant of the visa.

P. Maishman
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).